SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

Supreme Court of the United States

October Term 1953.

No. 34.

HOWELL CHEVROLET COMPANY, a Corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

Opinions Below.

The order of the National Labor Relations Board [R. 54-67] was issued on July 23, 1951, and is reported at 95 N. L. R. B. 410. The opinion of the Court of Appeals [R. 334-351] is reported at 204 F. 2d 79.

Jurisdiction.

The judgment of the Court of Appeals was entered on February 26, 1953. The petition for a writ of certiorari was filed April 8, 1953, and was granted May 18, 1953. The jurisdiction of this Court rests on 28 U. S. C., Section 1251(1).

Question Presented.

Whether the National Labor Relations Act, as amended is applicable to a retail automobile dealer who purchases and sells all of his merchandise within the boundaries of one state, where the motor cars and trucks sold by the automobile dealer are assembled within the same state.

Statute Involved.

The pertinent statutory provisions are printed in Appendix A, *infra*.

Statement.

Upon charges filed by the International Association of Machinists, a labor organization, the National Labor Relations Board, after the usual proceedings, issued its decision and order in which it found that Petitioner had violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended. The National Labor Relations Board found, with respect to Petitioner's business, that Petitioner is engaged in the sale and distribution at Glendale, California, of new Chevrolet motor vehicles, parts and accessories, under a dealer's agreement with Chevrolet Motor Division, General Motors Corporation. This agreement provides for certain controls as to the Petitioner's capital requirements, place of business, hours, servicing facilities, personnel, signs, and local area advertising. The Petitioner is one of a limited number of dealers selling Chevrolet products [R. 55-56]. All the Petitioner's sales and purchases are made within the

State of California. During the year 1949, the Petitioner purchased from the Chevrolet Motor Division, General Motors Corporation, new Chevrolet automobiles and trucks and parts and accessories with a value in excess of one million dollars. The new cars and trucks purchased and sold by Petitioner are manufactured at the Van Nuys, California plant of Chevrolet Division, General Motors Corporation [R. 16]. Approximately fifty-seven percent of the parts used to manufacture new cars and trucks at the Van Nuys, California plant of General Motors Corporation are shipped from points located within the State of California [R. 99].

Upon the basis of these facts the National Labor Relations Board rejected Petitioner's contention that it was not subject to the jurisdiction of the Board, chiefly upon the ground that Petitioner is an integral part of the national system of distribution of the Chevrolet Motor Division, General Motors Corporation [R. 56].

The Court below granted a decree of enforcement of the order of the National Labor Relations Board [R. 352]. The Court held that Petitioner was subject to the jurisdiction of the National Labor Relations Board because it was of the opinion that it could not disturb the Board's finding that Petitioner is an integral part of the national system of distribution of the Chevrolet Motor Division, General Motors Corporation under the authority of *N. L. R. B. v. Hearst Publications, Inc.*, 322 U. S. 111 and because it felt bound by its decision in *N. L. R. B. v. Townsend*, 185 F. 2d 378, cert. den., 341 U. S. 909.

Judge Stephens wrote a concurring opinion, in which Judge Harrison joined, in which he inferred that he personally was of the opinion that Petitioner was not subject to the jurisdiction of the National Labor Relations Board but that the Board's order must be enforced under the authority of the *Hearst* and *Townsend* cases, *supra*.

Specification of Error to Be Urged.

The Court below erred in holding that the National Labor Relations Act, as amended is applicable to a retail automobile dealer who purchases and sells all his merchandise within the boundaries of one state, where the motor cars and trucks sold by the automobile dealers are assembled within the same state.

Summary of Argument.

The Petitioner makes all of its purchases and sales within the State of California. It is thus clear that the Petitioner is not itself engaged in interstate commerce.

The Court below based its conclusion that Petitioner was subject to the jurisdiction of the Board in large part upon the Board's finding that Petitioner was an integral part of the national system of distribution of General Motors Corporation. Petitioner is an independent business and its relation with General Motors Corporation is merely that of purchaser and vendor. The record does not indicate the effect, if any, upon General Motors Corporation if Petitioner ceased to sell the products of that corporation. Thus, any conclusion reached with respect to this issue must be based upon mere conjecture.

The products sold by Petitioner have never moved in the stream of commerce. It is true that these products have incorporated therein parts and materials which have been transported in interstate commerce. However, to hold that this fact standing alone subjects Petitioner to regulation under the commerce clause would make practically all intrastate activities subject to control by the Congress. Such a construction of the commerce clause would destroy the distinction between domestic and interstate commerce, which the commerce clause itself has established. If the framers of the Constitution wished the Federal Government to have control over all commerce, they would have so provided.

If the system of dual sovereignty established by the Constitution is to be maintained a line must be drawn at some point between the power of the states and the power of the Federal Government to regulate. Petitioner is of the opinion that this line must be drawn here, in view of the fact that Petitioner makes all of its sales and purchases in one state, the products sold by Petitioner have never moved in the stream of commerce, and there has been no showing that it is necessary to regulate the business of Petitioner in order to regulate interstate commerce effectively. If the line is not drawn here, it can not be drawn anywhere.

ARGUMENT.

I.

Petitioner's Business Does Not Affect Interstate Commerce.

The petitioner, a retail merchant, makes all of its purchases and sales within the State of California. Thus, Petitioner is not itself engaged in interstate commerce, since there is no transportation or shipment of commodities from one state to another. *Id. Magnano Co. v. Hamilton*, 292 U. S. 40; *Commissioner of Corporations & Taxation v. Ford Motor Co.*, [illegible] Mass. 581.) Further, the record in the instant case discloses that the commodities dealt in by Petitioner have never moved in the stream of commerce and no relationship has been shown between Petitioner's purely intrastate transactions and the effective regulation of interstate commerce. It is thus clear that jurisdiction cannot be based here upon the regulation of goods which have moved in commerce, *Wilding v. Jacksonville Paper Co.*, 317 U. S. 569, or the necessity of regulating intrastate activities in order to make effective the regulation of interstate commerce. (*United States v. Darby*, 312 U. S. 24, 38 (C. A. 2).)

Petitioner [illegible] that under the commerce clause (Art. I, Sec. 8[illegible] Constitution of the United States) the Congress has the power to regulate intrastate activities which may directly and substantially affect interstate commerce. However, there are no facts in the record from which such a conclusion can reasonably be reached. The Court below placed great emphasis upon the Board's finding that Petitioner is an integral part of the national system of distribution of General Motors Corporation. In *N. L. R. B. v. Bill Daniels, Inc., et al.*, 202 F. 2d 579

(C. A. 6), where the facts were substantially the same as in the instant case, the United States Court of Appeals for the Sixth Circuit effectively disposed of this argument in the following language:

> "The Board contends also that the dealers involved are 'an integral part of the Ford Motor Company which is a multistate enterprise whose operations are admittedly interstate.' This contention has no merit. In order to be an integral part of Ford these dealers would have to be either employees or agents of Ford. It is not contended that they are employees and there is no evidence in the record that the dealers are agents of Ford. The contracts in essence are contracts between vendor and purchaser.
>
> "The sales contract, which expressly declares that the dealer is independent in his operations, does not establish a relationship of principal and agent. *Burkhalter v. Ford Motor Co.*, 110 S. E. 633, 29 Ga. App. 592; *Wall Auto, Inc. v. Chevrolet Motor Co.*, 8 F. 2d 409. Cf. *Ford Motor Co. v. Union Motor Sales Co.*, 244 F. 156 (C. A. 6). The relations voluntarily contracted for do not affect the situation. The test of agency is whether the dealer represents Ford and has authority to bind Ford. Under this record there is no evidence to this effect.
>
> "The efficient product arrangements made under the sales contract give it no interstate character. Respondents buy in Michigan, sell in Michigan and perform a local service."

A careful reading of the record also discloses that the only basis for this finding of the Board is the fact that Petitioner sells products manufactured by the General Motors Corporation. Thus, the same finding could be

made with respect to every person who sells commodities manufactured or sold by a person engaged in interstate commerce.

If this finding, then, were sufficient to subject a business to regulation under the commerce clause, it would subject all retail businesses, practically without exception, subject to regulation by the Congress. Under such an interpretation not only the traditional butcher, baker and candlestick maker, but also the shoe repairman in his shop and the barber on the corner would be subject to the jurisdiction of the Board, for all of them deal in commodities which are produced by persons who are engaged in interstate commerce.

In view of the absence of the record on the subject, the effect, if any, of Petitioner's business upon interstate commerce rests not upon mere conjecture. The more plausible assumption is that the operation of Petitioner's business would have no effect upon interstate commerce, in view of the large number of selling outlets which General Motors Corporation has in Petitioner's trading area and the highly competitive nature of the retail automobile business. The elimination of Petitioner from the market thus would not affect the sales of the products of General Motors Corporation but would merely reduce the number of sellers of that product who are bidding for the available market.

As Board Member Murdock stated in his dissenting opinion in *Johns Bros., Inc., et al.*, 84 N. L. R. B. 33:

> "A labor dispute affecting the operations of one dealer and forcing him to purchase fewer cars from Ford would have a remote, rather than a direct effect upon commerce. It is questionable whether a work

stoppage at the place of any one dealer would have any effect, direct or indirect, on interstate commerce."

In fact, an assumption is necessary before one even reaches the conclusion that a controversy between Petitioner and its employees who are involved here will affect Petitioner's volume of sales of General Motors Corporation's products. The employees here involved are engaged solely in repairing all makes of automobiles at retail for local customers. These employees are not concerned with the sale or purchase of products. Accordingly, if these employees were to cease work, the sale or purchase of the products of General Motors Corporation would in no wise be affected. The cessation of work by the employees here involved could affect the sale or purchase of products only if their controversy with Petitioner were in some manner to spread to Petitioner's other employees. There are no facts in the record which could form the basis for such a finding.

Even if one is willing to make the assumption discussed in the preceding paragraph, two additional assumptions must be made before one reaches the conclusion that the unfair labor practice with which Petitioner is charged affects interstate commerce. First, it must be assumed that all persons in Petitioner's marketing area who sell the same products must become involved in a labor dispute at the same time. Otherwise, the impairment of Petitioner's sales will merely increase the sales, and hence the purchases, of his competitors. Second, it must be assumed that, in the case of each of Petitioner's competitors in his marketing area, the assumed labor dispute will reduce each competitor's sales of the products sold by Petitioner. There is not a scintilla of evidence in the

record which would lend support to any of these assumptions.

Thus, the Board's finding that Petitioner's business affects commerce is not supported by evidence in the record but rests upon a pyramid of groundless assumptions. Since there is not substantial evidence on the record considered as a whole to support the Board's finding that the alleged unfair labor practice committed by Petitioner affects commerce that finding should be set aside, *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474.

Since the Board has limited jurisdiction, the facts supporting that jurisdiction must appear affirmatively from the record (*Danks v. Gordon*, 272 Fed. 821 (C. A. 2)). Since the record here does not affirmatively show that the Board does have jurisdiction, it must be presumed that the Board does not have jurisdiction in this case (*United States v. Green*, 197 F. 2d 19 (C. A. 9)).

If this Court permits the Board to continue to indulge in the assumptions made in this case, all business would be subjected to the jurisdiction of the Board, depending upon the whim of the Board in any particular case. If the Congress wished to give the Board this power it would have so provided in the National Labor Relations Act. Instead, the Congress chose to give the Board jurisdiction only over those businesses which affect commerce. Thus, the construction placed upon the National Labor Relations Act by the Board in this case would destroy the distinction between interstate and intrastate commerce created by the act itself.

In *Federal Trade Commission v. Bunte Brothers*, 312 U. S. 349, Mr. Justice Frankfurter, speaking for the Court stated,

> "The construction of Section 5 urged by the Commission would thus give a Federal agency control over myriads of local businesses in matters heretofore traditionally left to local custom or local law.— An inroad upon local conditions and local standards of such far-reaching import as involved here ought to await a clearer mandate from Congress."

There has been no such mandate from the Congress with respect to the subjecting of purely local businesses to the jurisdiction of the National Labor Relations Board. In fact, the Congress has made it clear that in passing the National Labor Relations Act it was not its intent to subject local business to its provisions.

In 1948 joint subcommittees of the House Committee on Expenditures in the Executive Departments and of the House Committee on Education and Labor were created to investigate the interpretation by Mr. Robert N. Denham, then General Counsel of the National Labor Relations Board, of the term "affecting Congress" as used in the National Labor Relations Act. On May 26, 1948, these subcommittees made a unanimous report (80th Cong., 2nd Sess., House Report No. 2050) which was unanimously approved and adopted by the full Committee on Expenditures. This report disclosed that Mr. Denham had stated that (pp. 5, 6),

> "The present thought of the Board—is that it is a rare case in which business does not affect com-

merce in some degree and that where commerce is affected the Board has jurisdiction.— I can conceive of very few businesses over which there is not at least technical jurisdiction."

In its findings the subcommittee stated (p. 3 of House Report No. 2050):

"Your subcommittee is certain that it was not the intention of Congress to include in the jurisdiction of the National Labor Relations Board every small, local business which drew a small portion of its supplies or merchandise from beyond the borders of a State or Territory.—

"The subcommittee is of the opinion that this new interpretation proposed by the general counsel of the Board to be placed upon the term 'affecting commerce' is not warranted either by the previous history of interpretation and administration of the Wagner Act, by the debates on the bill or by the terms of the Act itself; that such interpretation is not necessary to effectuate the purposes of the Act.

"The subcommittee looks upon this proposed interpretation as an attempt by administrative interpretation, to give the country administrative law in the place and stead of law enacted by the Congress. —Our national history does not afford a more striking example of bureaucratic aggrandizement."

II.

The Act Is Unconstitutional if It Is Construed as Applying to Petitioner.

By the very nature of the Constitution and the express provisions of the Tenth Amendment the Federal Government has only those powers which are delegated to it by the Constitution and all other powers are reserved to the states. If the Federal Government has any power to regulate the business of the Petitioner that power must come from Article I, Section 8, Subdivision 3 of the Constitution, which provides that the Congress shall have power "to regulate commerce with foreign nations and among the several States and with the Indian tribes." It is clear that Petitioner is not engaged in interstate commerce and that it is not necessary to regulate Petitioner's business in order to regulate interstate commerce effectively. The question which remains, then, is whether the business of Petitioner affects commerce to a sufficient extent to subject it to regulation by the Congress under the commerce clause.

As has been pointed out elsewhere in this brief, Petitioner has only a remote effect, if any, upon interstate commerce. The same reasoning which would subject Petitioner to regulation by the Federal Government under the commerce clause would subject all business to such regulation, since all business, regardless of its size, deals in some commodities which have been produced by a person engaged in interstate commerce. Such a construction would not only destroy our dual system of government but

also would destroy the distinction between intrastate and interstate commerce created by the commerce clause itself.

By the use of the Board's reasoning one could justify the regulation by the Federal Government of the minimum allowances to be given wives by their husbands. The argument would run as follows: In our society wives make most of the purchases. Most goods purchased at retail have been in the stream of commerce. Thus, the smaller the amount of money available for wives to spend, the smaller the volume of goods moving in commerce. It is true that the amount of money spent by any particular wife would have little effect upon commerce. However, if we consider all people similarly situated, *i. e.*, all wives, the effect on commerce is substantial. It therefore follows that the commerce clause gives the Federal Government power to regulate minimum allowances given wives by their husbands.

In *N. L. R. B. v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, Mr. Chief Justice Hughes stated at page 31:

> "The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds."

Mr. Chief Justice Hughes continued at page 37:

> "Undoubtedly the scope of this power (of Congress over intrastate activities) must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon inter-

state commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."

In *Schechter Poultry Co. v. United States*, 295 U. S. 495 at page 546, this Court stated:

"If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government."

The Court continued at page 548 after citing several cases:

"While these decisions related to the application of the federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government."

In his concurring opinion in the *Schechter* case, which was joined in by Mr. Justice Stone, Mr. Justice Cardozo stated succinctly the principle involved here when he stated at page 554:

"I find no authority in that grant (the commerce clause of the Constitution) for the regulation of

wages and hours of labor in the intrastate transactions that make up the defendant's business.—There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.' Per Learned Hand, J., in the court below. The law is not indifferent to considerations of degree. Activities local in their immediacy do not become interstate and national because of distant repercussions. What is near and what is distant may at times be uncertain. *Cf., Chicago Board of Trade v. Olsen*, 262 U. S. 1. There is no penumbra of uncertainty obscuring judgment here. To find immediacy or directness here is to find it almost everywhere. If centripetal forces are to be isolated to the exclusion of the forces that oppose and counteract them, there will be an end to our federal system."

The applicability of the principle established by this Court in the *Schechter* case to the instant case is clearly set forth in this Court's opinion in *Wrightwood Dairy Company v. United States*, 315 U. S. 110, where the Court stated at page 124,

"the defendants were not charged (in the *Schechter* case) with injury to interstate commerce or interference with persons engaged in that commerce, and that the acts charged had no different relation to or effect upon interstate commerce than like acts in any other local business which handles commodities brought into the State."

So here Petitioner is not charged with injury to interstate commerce or interference with persons engaged in that commerce and Petitioner's business has no different relation to or effect upon interstate commerce than that of any other local business.

A reading of the political literature at the time of the adoption of the Constitution shows clearly that the founders of our Republic did not intend to confer upon the Federal Government the broad powers claimed by the Board here. Alexander Hamilton, the leading proponent of a strong federal state, wrote in The Federalist Papers No. XVII,

> "The administration of private justice between the citizens of the same state; the supervision of agriculture, and of concerns of a similar nature; all those things, in short, which are proper to be provided for by local legislation, can never be the desirable cares of a general jurisdiction. It is therefore improbable that there should exist a disposition in the federal councils to usurp the powers with which they are connected.—"

So, too, James Madison wrote in The Federalist Papers, No. XLIV,

> "But ambitious encroachments of the federal government on the authority of the state governments would not excite the opposition of a single state or of a few states only. They would be signals of general alarm. —But what degree of madness could ever drive the federal government to such an extremity?
>
> "The only refuge left for those who prophesy the downfall of the state governments, is the visionary supposition, that the federal government may previously accumulate a military force for the projects of ambition."

There are some who state that the sole question to be answered is the wisdom of the use of the Federal powers in a given situation. Such persons take the position that the question is a political one. If the people wish to change the law they can always elect different representatives who are in accord with their wishes. If we are convinced by such arguments, it means the end of our system of constitutional government. The people are given the power by the Constitution itself to either enlarge or contract the powers of the Federal Government. However, until they do the Constitution is and must be, "The Supreme Law of the Land." Unless we hold fast to this central idea of our form of government, we face political anarchy.

This view of our Constitution is found in the writings of three of our greatest presidents. Thus George Washington stated in his Farewell Address,

> "If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed."

Thomas Jefferson wrote on the same subject,

> "I consider the foundation of the Constitution as laid on this ground. That 'all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, or to the people.' To take a single step beyond the boundaries

thus specifically drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition." (Ford Writings of Thomas Jefferson, Vol. V, p. 288.)

Andrew Jackson stated in his Farewell Address, in the same vein,

"It is well known that there have always been those amongst us who wish to enlarge the powers of the General Government, and experience would seem to indicate that there is a tendency on the part of this Government to overstep the boundaries marked out for it by the Constitution. Its legitimate authority is abundantly sufficient for all the purposes for which it was created, and its powers being expressly enumerated, there can be no justification for claiming anything beyond them. Every attempt to exercise power beyond these limits should be promptly and firmly opposed, for one evil example will lead to other and greater evil ones, mischievous, and if the principle of constructive powers or supposed advantages or temporary circumstances shall ever be permitted to justify the assumption of a power not given by the Constitution, the General Government will acquire more absorb all the powers of legislation, and you will have in effect but one consolidated government. . . .; and every friend of our free institutions should be always prepared to maintain unimpaired and in full vigor the rights and sovereignty of the States and to confine the action of the General Government strictly to the sphere of its appropriate duties."

In the *Jones & Laughlin* case, *supra*, this Court stated,

"The authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself estab-

labor, business commerce among the several states' and the internal commerce of the state. That distinction [illegible] essential [illegible] of our Federal system.

Petitioner [illegible] [illegible] the line between interstate and intrastate commerce [illegible]. Petitioner does not [illegible] [illegible] engaged in interstate commerce [illegible] in order to [illegible]. If petitioner's business is subject to Federal regulation under the commerce clause, then [illegible] Federal regulation under the commerce clause [illegible] the distinction between interstate and intrastate commerce, recognized by the Constitution, which has been repeatedly recognized by this Court, e. g., *Prudential Insurance Co. v. Benjamin, Insurance Commissioner*, 328 U. S. 408, 423, [illegible].

Conclusion

For the reasons stated it is respectfully submitted that the decree of the Court below should be reversed and the petition for enforcement of the National Labor Relations Board should be dismissed.

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APPENDIX.

The relevant provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. 141, Supp. IV, Sec. 151 *et seq.*) are as follows:

"DEFINITIONS.

"SEC. 2. When used in this Act—

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory or between points in the same State but through any other State or any Territory or the District of Columbia, or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."